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Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 64, ORIGINAL.

THE STATE OF NEW HAMPSHIRE,
PLAINTIFF,

v.

THE STATE OF MAINE,
DEFENDANT.

Motion and Brief of Amicus Curiae, the New Hampshire Commercial Fishermen's Association.

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Motion of New Hampshire Commercial Fishermen's Association for Leave to File Brief as Amicus Curiae.

The New Hampshire Commercial Fishermen's Association respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the attorney for the plaintiff herein has been obtained, but the attorney for the defendant herein has refused to consent to the filing of a brief by the New Hampshire Commercial Fishermen's Association as *amicus curiae*.

On September 20, 1974, the proposed *amicus curiae* (hereinafter the "Association") moved for leave to intervene in this case. The motion was referred to the special master who, on December 16, 1974, denied the motion, to which the Association excepted. However, the special master allowed the Association to proceed as *amicus curiae*, and in that capacity it filed briefs and memoranda on the legal and fac-

tual matters at issue in the dispute. (Report of the Special Master, Tom C. Clark, filed October 8, 1975).

The Association is an organization composed of New Hampshire lobster fishermen, who have clear, definable, and significant interests in the maritime area disputed in the instant case. The special master so recognized in his Order on Proposed Intervention (p. 2); "[T]he petitioning fishermen are obviously quite 'interested' in the outcome of the dispute . . . ." The fishermen's primary interest in the maritime area is that they earn their very livelihoods therefrom. They are but the latest of countless generations of New Hampshire fishermen who have traditionally fished in these waters. Possessing lobster licenses issued by the state of New Hampshire, the fishermen, and their predecessors, have traditionally fished in the area up to the line of "lights on range" (drawn in Appendix A to the accompanying brief). Because the businesses and livelihoods of the fishermen are derived from this area, and because of the long tradition of fishing in this area by New Hampshire fishermen, there is an intimate relationship between the fishermen and the disputed waters.

If the disputed area, or any part thereof, should be decreed to appertain to Maine, the fishermen will, pursuant to Maine law, be excluded from fishing in these areas. Maine law prohibits catching lobsters in Maine waters without a license (Me. Rev. Stat. Ann., 12 § 4404); and only legal residents of the state are entitled to such a license (Me. Rev. Stat. Ann., 12 § 4404[4]). Therefore, New Hampshire fishermen will be unable to fish in any portion of these traditional grounds in the disputed area which may, as a result of this case, become Maine territory, and these fishermen will thereby lose a commensurate portion of their income.

Moreover, the fishermen will be unable to transport lobsters of certain sizes, lawfully caught in New Hampshire

waters, through such portions of the disputed area which may appertain to Maine as a result of this case. Depending upon where the boundary line is ultimately drawn, this may prevent fishermen from transporting their catch by the most direct route to New Hampshire ports. This results from existing provisions of Maine law, which punish the possession in Maine territory of lobsters under 3 3/16 inches long, and over 5 inches long (Me. Rev. Stat. Ann., 12 § 4451 (1, 2). The minimum size applicable in New Hampshire is 3 1/8 inches (N. H. Rev. Stat. Ann., 211:27). This 1/16 inch difference is substantial, as it represents one year's growth of the lobster. New Hampshire law imposes no maximum size limit.

The Association believes that the true, legal boundary between the two states is one of three alternative lines, two of which lie to the northeast of the lines claimed by either of the parties. One line (Alternative 2 in Appendix A hereto) coincides with a line which will be contended for by New Hampshire. The Association has no reason to believe that the factual and legal arguments in support of the correctness of the other two lines will be presented to this Court by either party. If these arguments are approved by the Court, more of the disputed territory would appertain to New Hampshire, thus preserving the fishermen's traditional fishing rights therein, than would be the case with the lines contended for by either of the parties.

Respectfully submitted,

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Brief of Amicus Curiae.

Summary of Argument.

The boundary in issue, which has never been formally established, should be determined in accordance with the long established usage by fishermen in both states, who have traditionally and historically considered the boundary to be the "lights on range" line. The disputed area already belongs to the respective states. This is not a case involving the acquisition of territory which is *res nullius*, or the acquisition by one state of territory formerly belonging to the other; rather the Court is called upon to establish the boundary line in territory which already appertains to the respective states. The boundary should therefore be drawn so as to preserve existing traditional fishing practices, and should be based on the relative strengths of the claims of each state. This is not a case which calls for the application of the doctrine of prescription.

The "lights on range" line is additionally supported by maps and other evidence.

If the "lights on range" line is not the boundary, then the boundary is a line connecting the intersection of the geographic median line in the Piscataqua River with the closing line of Portsmouth Harbor, and the intersection of the median line in Gosport Harbor with that harbor's closing line.

The closing line of Portsmouth Harbor is not the line reported by the special master, but rather is a line drawn from Frost Point to Gerrish Island. This is the line which comports with the evidence, and with the geography and hydrology of the area.

The middle of the Piscataqua River must be determined without reference to low tide elevations in the river. The Royal Decree of 1740, which established the boundary in the river, did so without reference to these elevations, as they were uncharted in 1740, and played no part in the proceedings which led to the Decree. The median line must be measured between the banks of the river in order to give effect to the underlying principle that each riparian owns one half of the river and river bed. To measure the line from low tide elevations in the river does violence to this principle. These elevations are merely points of barren rock which protrude at low tide, and are located well into the river as measured from its actual banks. They therefore cannot be assimilated to the banks of the river.

The practice in interstate and international river boundary delimitations has been to ignore low tide elevations in drawing the median line. This comports with the Territorial Sea Convention, which does not permit such elevations to extend internal waters. The rule in the Convention that territorial sea median lines may be measured from low tide elevations merely follows from the fact that such elevations possess their own territorial sea. The median line in actuality divides the territorial sea of one state as ex-

tended by the low tide elevation, and that of the opposite state. These elevations do not have their own zone of internal waters and cannot extend internal waters from the coast. There is no extended zone of internal waters to be taken into account, and therefore, the median line in internal waters, such as the river, should not be measured from low tide elevations.

Argument.

I. Introduction.

The background of the present dispute, and the history of the states, so far as relevant to the dispute, are contained in the Report of Tom C. Clark, special master, filed October 8, 1975 (hereinafter the "Report"). The following discussion is concerned with the special master's analysis, which the *amicus* contends resulted in a boundary line which is not the true, legal boundary between the states.

II. The Special Master Erred in Rejecting Theories Supporting the Lights on Range Line.

In view of the fact that the boundary here in question has never before been formally established, either by grant, agreement or decree[1] the actual *usage* of people on both sides of the territory to be divided should be the primary consideration in fixing the location of the line.

[1] The original colonies did not own the waters in question (Report, pp. 8-32. *United States* v. *Maine, et al.*, No. 35, Original, decision of March 17, 1975) and the states acquired ownership of territory only 22 years ago, with the Submerged Lands Act, 43 U.S.C. § 1301 et. seq. (*United States* v. *Maine, supra*). The 1740 Royal Decree was not concerned with, and did not delimit, the boundary here in issue, presumably because the area did not appertain to the colonies.

The line which has been recognized as the boundary *by the people who are actually concerned with and affected by the location of the boundary* should be the line which in law is the boundary between the states. These people are those who fish for lobsters in the area. They are so affected because citizens of one state are excluded from fishing in waters of the other, and because each state imposes in its waters different laws regulating the possession of lobsters of certain sizes, and other regulations. See Motion for Leave to File Brief as *Amicus Curiae, supra.*

The fishermen from *both* New Hampshire and Maine have—since an indeterminate time in history—regarded the "lights on range" line as the boundary between the states.[1a] They have historically and traditionally regarded waters southerly of this line to belong to New Hampshire and waters northerly of the line to belong to Maine. They have traditionally and historically considered it illegal to fish in waters on the other side of this line, and have consistently acted in accordance with this belief, refraining from fishing in waters beyond their respective sides of the line.

The "lights on range" line has long historical usage. One of the lights which marks the line, Portsmouth Harbor Light, was erected some time before 1784 (Snow, *The Lighthouses of New England* (1973), p. 121); the other, Whaleback Light, was built in 1829. Snow, *supra,* p. 126.

The *amicus* submits that this usage establishes the "lights on range" line as the boundary from the intersection of this line with the geographic median line of the Piscataqua River (See *infra,* pp. 14-15) to the middle of Gosport Harbor.

The principle that actual usage by the persons who are directly affected by the location of the boundary should,

[1a] This is an extension of an imaginary line connecting Portsmouth Harbor Light (on Fort Point) and Whaleback Light.

in cases such as this, be the primary consideration in fixing the location of the line, is supported by international as well as American law.

In the *Grisbadarna Case* (Scott, *The Hague Court Reports* (1916), p. 121), Norway and Sweden agreed to submit a maritime boundary dispute to an international tribunal, which was to fix the boundary in accordance with principles of international law. The tribunal drew the boundary so as to divide two important lobster banks, giving one to Norway and the other to Sweden. It justified this line by the fact that it "is supported by all the circumstances of fact" in the case (at p. 130). Ruling that

> "it is a settled principle of the law of nations that a state of things which actually exists and has existed for a long time should be changed as little as possible" (at p. 130),

the tribunal drew the boundary line so as to give Sweden ownership of lobster grounds which had traditionally and historically been fished by Swedish fishermen, and Norway ownership of lobster grounds traditionally fished by Norwegians.

The existing "state of things" in the disputed area in the instant case closely parallels that in the *Grisbadarna Case*. The boundary between the two states should be drawn in conformity with the clear and long practice of lobster fishermen from both states (the only people directly affected by the location of the line) and should be drawn so as to maintain the jurisdiction of each state over those lobster areas in which its citizens have traditionally fished.

Similar considerations have been applied in boundary disputes decided by the United States Supreme Court. In *Vermont* v. *New Hampshire,* 289 U.S. 593; 53 S. Ct. 708; 77 L. Ed. 1392 (1933), an important basis for the boundary

adopted by the Court was that the line was adopted as the boundary in practice by people from both states. See also *Arkansas* v. *Mississippi,* 250 U.S. 39; 39 S. Ct. 422; 63 L. Ed. 832 (1919), holding that the practice of the inhabitants of disputed territory in recognition of a boundary has been given weight in several cases in which the true boundary was difficult to ascertain. The practice and general understanding of the inhabitants of the disputed area was also of great importance in fixing the boundaries in *Maryland* v. *West Virginia,* 217 U.S. 1, at 40-41, 46; 30 S. Ct. 268; 54 L. Ed. 645 (1910): "The people have generally accepted [the boundary] and have adopted it, and the facts in this connection cannot be ignored." Cf. *Indiana* v. *Kentucky,* 136 U.S. 479; 10 S. Ct. 1051; 34 L. Ed. 329 (1890) and *Virginia* v. *Tennessee,* 148 U.S. 503; 13 S. Ct. 728; 37 L. Ed. 537 (1893).

The sea area in dispute already belongs either to one state or the other (see the Submerged Lands Act, *supra*). The issue is, therefore, neither whether one state has acquired title to territory owned by no-one (*res nullius*), nor, whether one state has acquired territory which previously belonged to the other by acts sufficient to constitute prescription. The issue rather is how to delimit the boundary in a sea area already owned by the states. Such an issue is resolved by considering the relative strength of the claims of each side.

In the *Island of Palmas Case,* Permanent Court of Arbitration, Decision of April 4, 1928, reprinted at 22 American Journal of International Law 867 (1928), the United States and the Netherlands contested ownership of an island. The arbitrator, noting that the disputed island belonged either to the United States or to the Netherlands (p. 873), stated that if neither party could establish its claim to the island through continuous and peaceful display of sovereignty,

"the decision of the arbitrator would have to be founded on the relative strength of the titles invoked by each party" (p. 910). Similarly, in the *Minquiers and Ecrehos Case* (1953), International Court of Justice Rep. 47, a dispute between the United Kingdom and France over the ownership of certain islets in the English Channel, the Court stated, at p. 52:

> "Having thus been requested to decide whether these groups belong either to France or the United Kingdom, the Court has to determine which of the parties has produced the more convincing proof of title to one or the other of these groups, or to both of them. By the formulation of Article I [of the Special Agreement referring the dispute to the Court] the Parties have excluded the status of *res nullius* as well as that of the *condominium*."

The Court further noted that it was "called upon to appraise the relative strength of the opposing claims to sovereignty" over the islets (at p. 67).

By virtue of the practice of fishermen on both sides of the line, and in the absence of countervailing practices or claims by Maine, these considerations establish the "lights on range" line as the boundary between the two states.

The special master rejected the "lights on range" line as the boundary, saying that "[t]he conduct relied upon by *Amici* to establish the 'lights on range' line as the boundary by acquiescense, long usage, and prescription is simply not the sort of official governmental conduct which has been held to trigger the invocation of these equitable doctrines." (Report p. 56.) The special master has mistakenly assumed that the *amicus curiae* rely upon prescription to establish the "lights on range" line as the boundary. As explained above, while it would be necessary to invoke this doctrine

to justify the acquisition by one state of territory formerly owned by another, or the doctrine of continuous and effective display of sovereignty to justify the acquisition of *res nullius*, neither of these situations are involved in the instant case. The sea area to be divided here already appertains to the respective states, and the task of the Court is to establish the location of the boundary. This is not a case involving the acquisition of territory, *and it is therefore not necessary to meet the rigorous standards of prescription or analogous doctrines.*

Moreover, while governmental acts were involved in the *Grisbadarna Case, supra,* these acts were not crucial to the outcome. The existing state of affairs and circumstances of fact which the Tribunal sought to preserve was "that lobster fishing in the shoals of Grisbadarna has been carried on for a much longer time, to a much larger extent, and by a much larger number of fishermen by the subjects of Sweden than by the subjects of Norway." Scott, *supra,* at p. 130. The exercise of limited governmental acts in the area was simply an additional circumstance which lent greater weight to the appurtenance of the Grisbadarna to Sweden. It is erroneous to assume that Sweden would not have obtained the Grisbadarna if it had not exercised such governmental acts. The area belonged either to Norway or Sweden. If Sweden's claim, by virtue of Swedish fishing activities, was stronger than Norway's, then, even without Swedish governmental acts, the territory still would have been awarded to Sweden, the stronger claimant.

Nothing in the decision in that case indicates that it was decided on the basis of prescription. Indeed, Sweden's acts were insufficient to have supported the acquisition of prescriptive rights. The decision, rather, was based on the relative strengths of the two countries' claims, and the

principle requiring the preservation of an existing state of affairs. These are the principles on which the *amicus* currently relies.

III. The Special Master Erred in His Definition of the Closing Line of Portsmouth Harbor.

Alternatively, if the Court agrees with the special master that the boundary is a straight line connecting the intersection of the median line of the Piscataqua River with the closing line of Portsmouth Harbor, and the intersection of the median line in Gosport Harbor with its closing line (Report, p. 50), the *amicus* disagrees with the closing line of Portsmouth Harbor adopted by the special master, and with his method of finding the relevant intersection points.

The *amicus* submits that the closing line of Portsmouth Harbor is a line drawn from Frost Point to Wood Island to Gerrish Island. (See Appendix A.) Historically, the entrance to the harbor was considered to be at Fort Point (Letter of E. Randolph to Lords of Trade and Plantations (1683), in Belknap, History of New Hampshire (1791), v. 1, p. 463. Plan of the Province of New Hampshire, by Robert Fletcher, Deputy Surveyor, December 14, 1768. id., 1769). Belknap, *supra*, placed the main entrance to the harbor "between the north side of Great-Island [now New Castle Island] and Kittery Shore. . . ." At p. 145. Similarly, Blunt, American Coast Pilot (1822) states, at 146, that Fort Point on New Castle Island marks the harbor's entrance. Sailing directions contained on United States Coast Survey "Preliminary Chart of Portsmouth Harbor," 1854, place the entrance to the harbor at Fort Point.

The Royal Decree of 1740 commences its delimitation of the boundary on the mainland at "the middle of Piscataqua Harbour," and runs the boundary from there northward,

through the middle of the rivers which divide the (then) Provinces. Maps drawn subsequent to 1740, to implement the Decree, commence at Fort Point, and then run northward (Plan by New Hampshire Deputy Surveyor, Robert Fletcher, 1768; same, 1769; Plan drawn under direction of a Committee appointed by New Hampshire General Court, by Blomstrand (?) and Clapham, 1788). These plans must be viewed as interpreting the Royal Decree to commence the boundary therein at Fort Point, and to designate "the middle of Piscataqua Harbour" as Fort Point.

In 1854, a chart was drawn by a United States—United Kingdom Fishery Commission pursuant to a bi-lateral fishing treaty of that year (See Malloy, U. S. Treaties, v. 1, p. 670), drawing the closing line for Portsmouth Harbor from Frost Point to Wood Island to Gerrish Island. The closing line drawn by the Commissioners was to determine the outer limit of United States internal waters, where foreign fishing would not be permitted, and the beginning of territorial waters, where it would. A harbor is considered internal waters (Colombos, International Law of the Sea (6th ed.; 1967), p. 87) where foreign fishing is not permitted (Sorensen, Manual of Public International Law (1968), p. 335). Fishing treaties typically allow foreign fishing only to the baseline which divides territorial from internal waters, and excludes foreign fishing in internal waters. See Treaties in Lay, et al., New Directions in the Law of the Sea (1973) v. 1, pp. 41-95. This was also provided in the United States—United Kingdom Treaty, Malloy, *supra*, v. 1, pp. 670, 709. This closing line must, therefore, be taken to mark the outer limit of the harbor. If the Commissioners had considered the limit of the harbor to be further seaward, it would have so indicated by drawing the closing line further out.

Other evidence establishes the entrance to the harbor at, or near, the Frost Point—Gerrish Island line. This line coincides with the entrance to the harbor described in May, Early Portsmouth History (1926) 77-78.

Furthermore, this line accords with the physical characteristics of the area. The area between Wood Island and Stielman's Rocks (northwesterly of Wood Island) marks the approximate divide between the calm waters of the harbor, and the turbulent waters seaward. A harbor is defined as "A haven, or space of deep water so sheltered by the adjacent land as to afford a safe anchorage for ships. . . .[A] sheltered place, natural or artificial on the coast of a sea. . . ." Black's Law Dictionary (4th ed., 1957), p. 847. The sheltered area, or haven, commences in the area of Wood Island. The harbor entrance must therefore be considered to be in this area.

Finally, the Frost Point—Gerrish Island line comports with the geography of the area. This line is drawn between what may reasonably be considered to be the headlands of the harbor. In law, the closing line of a bay or harbor, marking the division between internal waters and territorial sea, is measured and drawn between the headlands or banks of the harbor or bay. See Colombos, *supra,* at 178-180; Convention on the Territorial Sea and Contiguous Zone, done at Geneva, 29th April, 1958, 15 U.S.T. 1606; T.I.A.S. 5639 (hereinafter "Territorial Sea Convention"), Art. 13.

IV. The Special Master Erred in His Use of Low Tide Elevations.

The special master commences the boundary line at the point where the "middle" of the Piscataqua River crosses the closing line of the mouth of the harbor. Report, p. 49.

The *amicus curiae* agrees that the phrase "middle of the river" as used in the 1740 Decree means the geographic

median line of the river,[2] that is, "a continuous line following the meandering of the river and everywhere equidistant from the nearest points on opposite sides using the actual water edges at the mean low water line." Report, p. 42.[3] However, the *amicus* disagrees with the special master's taking into account low tide elevations in the river in drawing the median line, and his finding the point at which the median line crosses the mouth of the harbor by reference to such elevations.[4]

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[2] The special master correctly concluded that the phrase "middle of the river" in the 1740 Decree referred to the geographic median line, rather than the "thalweg." Report, pp. 41-42. The phrase must be interpreted in accordance with the principles of law in force in 1740. *The Grisbadarna Case*, Scott, The Hague Court Reports (1916) pp. 121, 127. Prior to the early 19th century, the law designated the boundary in a river to be the median line. 3 Verzijl, International Law in Historical Perspective (1970), 553 et seq. The thalweg principle was first proposed in 1797 in the Congress of Ratstadt, and was first employed in the Treaty of Luneville, 1801. 3 Verzijl, *supra,* 554; Cukwurah, the Settlement of Boundary Disputes in International Law (1967), 52; *New Jersey* v. *Delaware,* 291 U.S. 361, 381-383; 54 S. Ct. 407; 78 L. Ed. 847 (1934). The thalweg theory spread to other European waterways in the first decades of the nineteenth century, but its development in North America was slower. 3 Verzijl, *supra,* 534-535. It "was not authoritative doctrine prior to 1892 . . ., and certainly not . . . in 1812." *Texas* v. *Louisiana,* 410 U.S. 702, 709; 93 S. Ct. 1224; 35 L. Ed. 2d 627 (1973). Clearly, the thalweg rule did not exist in 1740 and the "middle of the river' was considered to be the geographic median line.

[3] For the method used to construct the median line, see Pearcy, "Geographic Aspects of the Law of the Sea," 49 *Annals of the Association of American Geographers* 1, 17-18 (1959); Boggs, "Delimitation of Seaward Areas Under National Jurisdiction," 45 *American Journal of International Law,* 240, 257 (1951). This was the method used by the special master in the instant case.

[4] The special master acknowledges that he did draw the median line by reference to low tide elevations in the river. Report, pp. 42-43, fn. 84. This has been confirmed by Mr. Justice Clark's law clerk, who also has supplied a chart showing the low tide elevations

The median line should be measured between the opposite banks of the river, on islands or the mainland, and should not be measured from low tide elevations.[5] Assuming the correctness of the special master's closing line, the point at which the median line crosses the harbor (which is the point at which the lateral marine boundary commences) should therefore be at point B shown on Appendix A, rather than at point A, adopted by the special master. The effect of taking into account low tide elevations in drawing the median line is to deflect in a southwesterly direction the junction of the median line with the harbor's closing line, and, therefore, the entire lateral boundary line.

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used by the special master. These are indicated on Appendix A hereto as points 1, 2 and 3. Whether the median line should be drawn by reference to low tide elevations was never, prior to the issuance of the Report of the special master, an issue in these proceedings, and therefore was never considered or addressed by the parties. No evidence directed to the issue was presented to the special master by either party, and the special master made no findings of fact in support of his conclusion. Consequently, if the Honorable Court believes that it requires certain evidence or factual findings in order to rule on this issue, the *amicus curiae* respectfully suggests either that the Court conduct the necessary evidentiary hearings, or that the matter be referred back to the special master to make such findings.

[5] There is a distinct difference between "islands" and "low tide elevations." An "island" is "a naturally formed area of land, surrounded by water, which is above water at high tide." Convention on the Territoral Sea and Contiguous Zone, Done at Geneva, 29th April, 1958 (hereinafter "Territorial Sea Convention"), 15 U.S.T. 1606; T.I.A.S. 5639, Article 10. A "low tide elevation" is "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide." Territorial Sea Convention, Article 11(1). These definitions have been adopted by the Supreme Court. *United States* v. *Louisiana*, 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969). See, also, *United States* v. *California*, 382 U.S. 448; 86 S. Ct. 607; 15 L. Ed. 2d 517 (1966). *United States* v. *Ray*, 294 F. Supp. 532 (S.D. Fla., 1969). As will be demonstrated, important factual and juridical differences flow from the distinction between these two types of formations.

(a) *The 1740 Decree Does not Delimit the "Middle of the River" by Reference to Low Tide Elevations.*

The language of a judicial decree must be construed with reference to the facts on which the decree was based and the circumstances under which the language was used. 21 C.J.S., Courts, § 222, pp. 409-411; *Armour & Co.* v. *Wantock*, 323 U.S. 126, 133; 65 S. Ct. 165; 89 L. Ed. 118 (1944); *The Grisbadarna Case*, note 2, *supra*, at 127. See also, *United States* v. *Wise*, 370 U.S. 405, 411; 82 S. Ct. 1354; 8 L. Ed. 2d 590 (1962). Therefore, as the special master concluded, the phrase "middle of the river" occurring in the 1740 Decree must be interpreted in accordance with the facts and circumstances existing in 1740. Report, pp. 40-42.

So far as the *amicus* has been able to determine, the low tide elevations in question are not shown on any chart or map published prior to, contemporaneous with, or within a reasonable time after the 1740 Decree.[6] As the special master concluded, "it cannot be said that uncharted 'rocky reefs' or later navigational aids could have played any part in the deliberations of the King and Commissioners." Report, p. 36.

The "middle of the river," which constituted the boundary between the states from and after the 1740 Decree, and which constitutes the boundary to this day, was therefore determined without reference to low tide elevations. Since the present river boundary is the one established by the 1740 Decree, it should not be drawn with reference to the low tide elevations, and neither, perforce, should the intersection of the middle of the river with the closing line of the harbor.

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[6] They do not appear on any such maps and charts submitted to the special master by the *Amici Curiae*.

(b) *The Median Line must be Measured from the Banks of the River and Not from Low Tide Elevations.*

The Supreme Court has established that the median line of a river is the line which is "midway between the main banks of the river." *Georgia* v. *South Carolina,* 257 U.S. 516, 523; 42 S. Ct. 173; 66 L. Ed. 347 (1922). In *New Jersey* v. *Delaware,* 291 U.S. 361, 379; 54 S. Ct. 407; 78 L. Ed. 847 (1934) the median line was described as the line "halfway between the banks." The median line was defined in *Arkansas* v. *Mississippi,* 250 U.S. 39, 43, 45; 39 S. Ct. 422; 63 L. Ed. 832 (1919) as "the line equidistant from the banks [of the river]." In 8 Opinions of the United States Attorney General 175, the Attorney General opined that the line of the middle of a river is the middle of the river bed, between the banks of the river.

That the median line is fixed by reference to the main banks of the river is universally supported by other authorities. See 1 McNair, Oppenheim's International Law (1928), p. 425; 2 Shalowitz, Shore and Sea Boundaries, (1964) p. 374, fn. 30.

It was recognized in *Georgia* v. *South Carolina,* 257 U.S. 516, 523; 42 S. Ct. 173; 66 L. Ed. 347 (1922), that in certain circumstances the bank on an island in the river may be used in determining the median line. However, this exception to the general principle has been applied only in the case of islands, and not in the case of low tide elevations.[7]

The measurement of the median line from the main banks of the river (or, where applicable, from islands in the river) applies the underlying theory of the median line principle: that each riparian state owns half of the water and bed of the river. Boggs, International Boundaries (1940), p. 180;

[7] For the important distinction between islands and low tide elevations, see note 5, *supra.*

Ingraham v. *Wilkinson,* 4 Pick. (21 Mass.) 268 (1826); *United States* v. *Elliott,* 131 F. 2d 720 (10th Cir., 1942). *Hardin* v. *Jordan,* 140 U.S. 371; 11 S. Ct. 808, 838; 35 L. Ed. 428 (1891); *Wisconsin* v. *Michigan,* No. 12, Orig., Supplemental Report of Special Master, 7 (the practice applies "the rule of equality of water area . . ."); Cukwurah, the Settlement of Boundary Disputes in International Law (1967), p. 50; Glos, International Rivers (1961), p. 110; 93 C.J.S., Waters, § 71, p. 745-746. The "river" is all of the water and the subsoil between its banks; Wisdom, The Law of Rivers and Watercourses (1962), p. 3; and the banks of the river border and enclose the river. *Oklahoma* v. Texas, 260 U.S. 606, 631; 43 S. Ct. 221; 67 L. Ed. 428 (1923). *Mammoth Gold Dredging Co.* v. *Forbes,* 104 P. 2d 131, 137 (Cal., 1940). *Seibert* v. *Conservation Commission of Louisiana,* 159 So. 375, 377 (La., 1935). Wisdom, *supra,* pp. 10-11, 38-40.[8]

In the instant case, the water flowing between Whaleback Reef and Gerrish Island is as much a part of the river as is the water between the reef and the New Hampshire bank. To measure the median line from low tide elevations in the reef, rather than from the banks of Gerrish Island or Wood Island, gives Maine much more than half of the river water, and New Hampshire much less. The same result obtains with respect to the river bed. Low tide elevations are a part of the river bed. *United States* v. *Ray,* 423 F. 2d 16, 20

[8] For reasons discussed *infra,* pp. 23-24, neither the low tide elevations in Whaleback Reef, nor the reef itself, can be considered part of the "bank" or shoreline of the river. Suffice it to note at this point that it does not border or enclose the river, that it is located almost one-third of the way into the river from the Maine shoreline, and that the waters between the reef and the Maine shoreline and adjacent islands are sufficiently deep, are navigable and in fact actively navigated, and are not inextricably linked to the mainland.

(5th Cir., 1970). 1 Shalowitz Shore and Sea Boundaries (1962), p. 228.[9] To measure a median line from a point in the bed, rather than from its edge (i.e., the banks of the river on the mainland or an island) has the obvious effect of giving Maine more than half of the bed and New Hampshire less than half.

The measurement of the median line from low tide elevations therefore does violence to the principle underlying the median line rule: that each riparian state should receive half the river and river bed. It produces a "distorted and anomalous" situation (Fitzmaurice, "Some Results of the Geneva Conference on the Law of the Sea," 8 International and Comparative Law Quarterly 73, 85, fn. 30 (1959)), and violates "the major community policy at stake" with respect to boundary problems of opposite states: "that of achieving equitable apportionment." McDougal & Burke, Public Order of the Oceans (1962), p. 428. See also Pearcy, *supra*, note 3, at 16.

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[9] Other definitions of the bed of a river compel the conclusion that low tide elevations are a part of the bed. See *Oklahoma* v. *Texas*, 260 U.S. 606, 632; 43 S. Ct. 221; 67 L. Ed. 428 (1923):

"When we speak of the bed we include all of the area which is kept practically bare of vegetation by the wash of the waters of the river from year to year in their onward course, although parts of it are left dry for months at a time"; *Alabama* v. *Georgia*, 64 U.S. 505, 515; 16 L. Ed. 412 (1859);

"[T]he bed of the river is that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn." (This definition was also adopted in *Oklahoma* v. *Texas*, *supra*, at 631). In *United States* v. *Chicago, M., St. P., & P. R. Co.*, 312 U.S. 592, 597; 61 S. Ct. 772; 85 L. Ed. 1064 (1941), the bed was defined as "the lands below ordinary high water mark."

A former Geographer of the United States Department of State has squarely addressed the issue of whether a median line between opposite coasts may be drawn from offshore formations. Boggs, "Delimitation of Seaward Areas Under National Jurisdiction," 45 American Journal of International Law, 240, 257-258 (1951). He states,

> "Islands in a lake, gulf or bay may complicate the determination of the base line employed in laying down the median line. Because islands, large and small, are found both near and far out from coasts in water bodies of all sizes and shapes, it seems incontrovertible that *the median line should, as a general rule, be derived as nearly as proves feasible only from the mainland coast.* [Emphasis supplied.]
>
> "Obviously, some islands must be treated as if they were part of the mainland. The size of the island cannot in itself serve as a criterion as it must be considered in relation to its shape, orientation and distance from the mainland. The most reasonable and workable rule is believed to be to draw *that pair of parallel lines* tangent to opposite ends or sides of the island which encloses the *least area of water* between island and mainland. . . . Then, if the land area of the island (properly planimetered from the low tide shoreline) exceeds the water area bounded by the parallel lines, the island and mainland, the island should be reckoned as if part of the mainland base line, in laying down the median line. . . ." At p. 258. See the illustration at p. 257.

Although Boggs' analysis dealt with off-shore islands, his conclusions apply equally to low tide elevations. Such formations should be disregarded in drawing the median line unless they are so integrally related to the mainland as to constitute part of the coast.

(c) *The Low Tide Elevation in Whaleback Reef is Not Part of the Bank of the River.*

The line of the middle of the river is the line which is midway between the banks of the river. The term "banks" has been variously defined, but it is clear that the banks are the areas which border, enclose and confine the river. See 2 Shalowitz, *supra,* at 373, and the authorities there cited. See also, *Howard* v. *Ingersoll,* 17 Ala. 781 (1851); Wisdom, *supra,* 10-11. In no way can any of the low tide elevation in Whaleback Reef be said to border and enclose the river.

At issue here is whether these elevations should be assimilated to the bank of the river so as to be treated as part of the bank. They cannot be so treated. In *United States* v. *Louisiana,* 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969) the Supreme Court considered whether certain islands could be considered the headlands of bays. 394 U.S. at 60-66.[10]

This depended on whether the islands in question were "so integrally related to the mainland that they are realistically part of the 'coast' . . ." 394 U.S. at 66.[11] In this connection the Court stated:

[10] The Court held that *in that context* there was no distinction between islands and low tide elevations. 394 U.S. at 60, fn. 80. In other words, if an island could be considered a headland, then so could a low tide elevation. The Court was careful to point out the difference between using a low tide elevation for drawing straight baselines (which is impermissible: see p. 30 et seq., *infra*) and considering it as a headland of a bay. The Court did *not* say, as is implied by the special master in the instant case (Report, p. 42, fn. 84), that there is in general no distinction between islands and low tide elevations; nor did it state that there is no such distinction for the purpose of drawing baselines. Indeed, the Court was careful to state quite the contrary.

[11] See also, 1 Shalowitz, *supra,* at 161, fn. 125: "The coastline should not depart from the mainland to embrace offshore islands, except where such islands either form a portico to the mainland

> "While there is little objective guidance on this question to be found in international law, the question whether a particular island is to be treated as part of the mainland would depend on such factors as its size, its distance from the mainland, the depth and utility of the intervening waters, the shape of the island, and its relationship to the configuration or curvature of the coast." 394 U.S. at 66.

The elevation at Whaleback Reef is small; in fact, it is merely the tip of a rock which protrudes at low tide. The same is true of every other elevation in the Reef.[12][13] The elevation therefore does not meet the size criterion in the above quotation from *United States* v. *Louisiana.*

The elevation used by the special master (point 3 on Appendix A) is nearly one-third of the way into the river as measured from the nearest point on the coastline of Gerrish

and are so situated that the waters between them and the mainland are sufficiently enclosed to constitute island waters, or they form an integral part of a land form." Quoted at 394 U.S. at 65-66, fn. 85. (Emphasis in original.)

[12] As for the "elevation" on which the lighthouse sits, it appears that this is entirely man-made, consisting of rip-rap piled upon a previously submerged formation. Thus, it cannot be considered either an island or a low tide elevation, both of which must be "naturally formed." Territorial Sea Convention, Art. 10, 11 (1).

[13] The elevations in the Reef must be considered individually, rather than in relation to each other, in a "leapfrogging" manner, or as a unit. See *United States* v. *Louisiana,* No. 9, Orig., Report of Walter P. Armstrong, Jr., Special Master, p. 41. It is not the entire reef which is to be considered, but merely the individual rock or rocks which protrude at low tide. The "reef" consists of these individual rocks.

Island.[14] A formation this far into the river cannot be considered part of the bank of the river.[15]

The waters between the elevations in the reef and Gerrish Island (as well as the waters between the reef elevations and Wood Island) are up to eighteen feet deep, are navigable, and are in fact frequently navigated by vessels as large as 65 feet.[16] There is no inextricable and integral relationship between the waters and the shore. Finally, the elevations significantly depart from the general direction and curvature of the coastline on Gerrish Island.

The elevations in question, therefore, do not satisfy any of the criteria established by the Supreme Court in *United States* v. *Louisiana, supra,* for determining whether such

[14] The elevation in the reef which is nearest to Gerrish Island is one-fifth of the way into the river.

The elevations should be considered in relation to Gerrish Island, which forms the actual bank of the river, rather than in relation to other elevations, or to Wood Island. The issue is whether, because of proximity to the actual coastline, the elevation should be considered part of the coastline. To consider an elevation in relation to other off-shore formations would impermissibly extend the "coastline" to an illogical limit. See *United States* v. *Louisiana,* No. 9, Orig., Report of Walter P. Armstrong, Jr., Special Master, 41.

[15] A formation "must be considered in relationship to its shape, orientation and distance from the mainland." Boggs, "Delimitation Of Seaward Areas Under National Jurisdiction," 45 American Journal of International Law 240, 258 (1951); cited in *United States* v. *Louisiana,* 394 U.S. at 65, fn. 85.

[16] See Pearcy, "Geographical Aspects of the Law of the Sea," 49 Annals of the Association of American Geographers 1, 9 (1959) where the former Geographer of the United States Department of State explained that formations may be assimilated to the coast if they are "near [and] separated from the mainland by so little water that for all practical purposes the coast of the island is identified as that of the mainland." Such is not the situation in the instant case.

formations should be considered part of the coastline.[17] Moreover, they do not satisfy the test established by Boggs, quoted *supra* at p. 21, for determining whether a particular off-shore formation can be treated as part of the mainland for the purpose of drawing a median line. The area of the elevation at Whaleback Reef, and indeed, the area of the entire reef, is far less than the water area between the elevation or reef and the shore on Gerrish Island.

The elevation therefore cannot be treated as part of the river bank, and should be ignored in drawing the median line.

The conclusion of the special master that the median line may be drawn from low tide elevations should not carry with it the assumption that the special master implicitly made the necessary factual findings to support his conclusion. As stated in footnote 4, this issue first appeared as a footnote in the special master's report (Report, p. 42, fn. 84). It was never addressed by the parties, and no evidence was ever presented thereon. The special master's conclusion is based on his general assumption, which the *amicus* maintains is erroneous, that low tide elevations are juridically the same as islands, and in all cases can be used to draw a median line, regardless of whether the criteria established in *United States* v. *Louisiana, supra,* or set forth by Boggs, *supra,* have been met.

(d) *The Practice in Drawing Median Lines in Rivers has been to Ignore Low Tide Elevations.*

Median lines in boundary waters between states of the United States, and between countries, have in practice

[17] The special master in *United States* v. *Louisiana, supra,* note 12, using the criteria established by the Supreme Court in *United States* v. *Louisiana,* 394 U.S. 11, 66 (1969), concluded that certain low tide elevations along the Louisiana coast could not be assimilated to and treated as part of the mainland. See Report of Walter P. Armstrong, Jr., Special Master, 37, 38, 41, 52-53.

been drawn without reference to low tide elevations. The most recent example in this country is the boundary line in *Texas* v. *Louisiana,* No. 36. Orig. (1975). The special master in that case established as the boundary line in Sabine Lake and Sabine Pass, which divide Texas and Louisiana, "the median line marked on Louisiana Exhibits DDD and III. . . ."[18] Report of Special Master, p. 48. An examination of these exhibits and an analysis of the line therein, by plotting with dividers, reveals that the median line was measured from the actual banks of the lake and pass, without reference to offshore islands and marshes.

The proceedings in *Wisconsin* v. *Michigan,* No. 12 Orig. (1935), also demonstrate this practice. At issue in that case was the boundary line in Green Bay. The Supreme Court had previously concluded that the boundary was to be the geographic middle of the bay (*Wisconsin* v. *Michigan,* 295 U.S. 455, 462; 55 S. Ct. 786; 79 L. Ed. 1541 (1935)), and referred the case back to the special master for the purpose of drawing the line in accordance with the Court's decree. A chart was filed with the special master[19] on which were drawn two lines — one labeled "Nearest Land Method," and the other labeled "Mid-section Method." It is clear from an analysis of the "Nearest Land Method" line that this is the median line which is everywhere equidistant from the land (including islands) of the opposite states. It is the median line drawn in ac-

[18] These exhibits are kept in the storage area in the Supreme Court Building, in Box 7 of the Exhibits in *Texas* v. *Louisiana,* No. 36, Orig.

[19] War Department, Coast Chart No. 2, "West Shore of Lake Michigan," on file in the Cartography Division, National Archives, Washington, D.C.

cordance with the same principles which govern the instant case.

From analyzing and plotting this line with dividers, it is clear that it was drawn without regard to low tide elevations in the bay. The line was drawn without regard to Horseshoe Reefs off the Wisconsin coast, and goes directly through Whaleback Shoal, to the north of Horseshoe Reefs. The line was also drawn without regard to Eleven Foot Shoal, Corona Shoal, Minneapolis Shoal, North Drisco Shoal and Drisco Shoal, which are located in the vicinity of 45° 33′ North and 86° 58′ West, and St. Martin's Shoals, located in the vicinity of 45° 27′ North and 86° 46′ 20″ West. It is therefore apparent that this median line was drawn by measuring from the coastline on islands and the mainland, and that low tide elevations were ignored.

The "Mid-section Method" line equally divides the water area bordered by the banks on the mainland, and ignores islands in the bay. It is clear that this line too was drawn without regard to low tide elevations.

The boundary line reported by the special master in that case appears on War Department Chart No. 70, "North End of Lake Michigan," on file in the Cartography Division, National Archives, Washington, D.C.[20]

The special master noted, at page 8 of his Supplemental Report, that line BX on the Chart was "the exact geographical center of the bay" in that portion of the bay. An analysis of this line with dividers makes it clear that this line was drawn without regard to low tide eleva-

[20] A smaller copy appears at "Exhibit B" appended to Supplemental Report of Special Master, on file in the National Archives. The Supplemental Report of the special master was accepted by the Supreme Court at *Wisconsin* v. *Michigan,* 297 U.S. 547; 56 S. Ct. 166; 80 L. Ed. 388 (1936).

tions, particularly the "rock awash" located at 45° 5′ 30″ North and 87° 19′ 20″ West, near the Wisconsin coast. It also ignored Strawberry Islands to the northeast of the "rock awash." (Although the special master found that this line represented the exact geographical center of the bay, he could not adopt it as the boundary because it traversed Chambers Island, which belonged wholly to Wisconsin. He therefore adopted line BC as the boundary in that portion of the bay, point C being adjacent to point X).

The special master continued the boundary line in the bay by drawing line CK, point K being "practically in the center of the bay." (Supplemental Report of Special Master, p. 9). This is the case when that point is measured from the mainland, rather than from Strawberry Islands and Horseshoe Reefs, off the Wisconsin coast.

The special master next drew line KL, which he stated, at page 9, to be "almost exactly in the geographical center of the bay." This line represents the geographic median line measured from the mainland, without regard to Horseshoe Reefs and Whaleback Shoal.

The above cases demonstrate the practice in drawing median lines in rivers and inland waters between states to draw such lines by reference to the actual shore line on the mainland or islands, and to ignore low tide elevations.

This is also the practice in drawing international frontiers in boundary rivers. In the treaty between El Salvador and Guatemala, April 9, 1938, the median line in the rivers between the two countries was established as the boundary. United States Department of State, Office of the Geographer, International Boundary Study No. 82- El Salvador-Guatemala Boundary (1968). The official maps drawn by the Joint Frontier Commission pursuant

to and implementing the treaty show that the median lines were drawn midway between the banks, and ignored elevations in the rivers. See Mapas que Acompanan a Informe Rendido a los Respectivos Gobiernos por la Comision Mixta de Limites entre Guatemala y El Salvador (1942), especially Hoja No. 5- Secion de Suriano a Ocean Pacifico.

The frontier between France and Switzerland in Lake Geneva is the median line of the lake, which is "defined by the locus of the centers of circles enscribed between the Swiss and French banks." United States Department of State, Office of the Geographer, International Boundary Study No. 11, France-Switzerland Boundary (1961), p. 3.

It is clear, then, that in drawing median boundary lines in internal waters, these lines in practice are measured from the banks on the mainland or islands, and low tide elevations are ignored.

(e) *The Rule that Low Tide Elevations should be Ignored in Drawing the Median Line is Consistent with the Territorial Sea Convention.*

It has been explained that it is permissible to depart from the principle that the median line in a river is to be measured from the true banks of the river, and measure the line from off-shore formations, when, because of the geographic nature of the formation, its close proximity to the mainland, and the close affinity of the formation and the intervening waters to the mainland, the formation should be treated as part of the bank of the river. This principle is in accordance with rules established in the Territorial Sea Convention.

Article 3 of the Convention provides that "[e]xcept where otherwise provided in the Articles, the normal baseline for measuring the breadth of the Territorial Sea is

the low water line along the coast. . . ." This rule that the baseline (which is the line which divides internal waters and the Territorial Sea: Art. 5 (1)) must follow the actual coastline may be departed from in "localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity. . . ." In such situations, straight baselines may be drawn between appropriate points. Art. 4(1). However, "[T]he drawing of such baselines must not depart to any appreciable extent from the general direction of the coast, and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters." Art. 4(2). Moreover, it is specifically provided that straight baselines "shall not be drawn to and from low tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them." Art. 4(3).

The scheme in the Convention therefore permits a departure from the actual coastline when the geographic circumstances mentioned in Article 4(1) exist. But even when such geographic justification exists, specific baselines must be drawn in accordance with the criteria in Article 4(2) and (3). These criteria ensure that baselines will be drawn only to and from those points which are so integrally related to the mainland that they should realistically be considered part of the coast.

Low tide elevations are specifically excluded as points to and from which straight baselines may be drawn. The reason for this was explained by the International Law Commission in its Commentary to its Draft Article 5,[21] which was the basis of the convention Article 4:

[21] Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159), pp. 13-15. Draft Article 5 (1) provided that "baselines shall not be drawn to and from drying rocks and drying shoals." Id., at p. 14.

> "Straight baselines may be drawn to islands situated in the immediate vicinity of the coast but not to drying rocks and drying shoals. Only rocks or shoals permanently above sea level may be used for this purpose. *Otherwise the distance between the baselines and the coast might be extended more than is required to fulfill the purpose for which the straight baseline method is applied,* and, in addition, it would not be possible at high tide to sight the points of departure of the baselines." Commentary (8), p. 15. [Emphasis supplied.]

The Commission's point with respect to the portion italicized above is that when straight baselines are drawn to and from off-shore formations, the waters landward of the baselines become internal waters [Territorial Sea Convention, Art. 5(1)], and the nature of low tide elevations, and their relationship with the mainland, are not such as to justify creating such an extended zone of internal waters.

McDougal and Burke also explain that "it is not normally expected that [a low tide elevation] has any particular use to the local population; nor can it realistically be considered as a dependable landmark for interested mariners." Public Order of the Oceans (1962), p. 388.

It therefore appears that the rationale of the Convention prohibition of drawing straight baselines to and from low tide elevations is that such formations, being merely barren rocky points protruding at low tide, of no particular use to the local population, and unsatisfactory for use by mariners, are not so integrally related to the ac-

tual coast as to warrant departing from the coastline and extending internal waters to baselines drawn to and from the elevations. Nor are the waters between the elevations and the mainland sufficiently linked to the land domain to constitute internal waters.

For the same reasons, and by analogy to these convention principles, low tide elevations cannot be considered part of the coast for the purpose of drawing a median line.[22]

The conclusion of the special master in the instant case relative to the use of low tide elevations (Report, p. 42, fn. 84) is based upon an erroneous application of the precise Convention rules which govern the delimitation of the *Territorial Sea* between opposite coasts[23] to the establishment of the median line in *internal waters,* i.e. the river.[24]

[22] The existence of a lighthouse on one of the elevations in Whale-back Reef does not justify using this elevation as a point from which to measure the median line, since, for reasons explained in the previous section (that the criteria set forth in *United States* v. *Louisiana,* and by Boggs, were not satisfied) the elevation is not so integrally related to the bank of the river as to be treated as part of the bank.

[23] The relevant rules in the Territorial Sea Convention which the special master implicitly applied in the instant case are the following: *Article* 12(1): "Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its territorial sea beyond the median line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial seas of each of the two states is measured . . ." *Article* 11(1): "Where a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low water line on that elevation may be used as the baseline for measuring the breadth of the territorial sea."

[24] For a discussion of the factual and juridical differences between internal waters and the territorial sea, see *United States* v. *Louisiana,* 394 U.S. 11, 22 (1969). Waters on the landward side of the baseline of the territorial sea are internal waters [Territorial Sea Convention, Art. 5 (1)]; and the baseline of a river is the line drawn across its mouth between points on the low tide line of its banks [Territorial Sea Convention, Art. 13]. A river is part of a state's internal waters.

There is a distinction between applying the median line rule to the delimitation of river boundaries as opposed to territorial sea boundaries.

> "Because of the relationship between seaward boundaries not merely to the coastal States involved but to the international community which utilizes and depends upon the adjacent high seas, international law has specifically recognized different rules for delimiting the boundaries of the States adjacent to those waters." *Texas* v. *Louisiana,* No. 36, Orig., Brief for the United States in Response to Texas' Brief in Support of its Exceptions to the Report of the Special Master, filed September 15, 1975.

The International Law Commission recognized in its Commentary to its Draft Article 12, which was the basis for the Convention Article 12, that the rules therein "cannot be applied in all circumstances" and that internal waters could be subject to different rules. Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159), p. 18. The precise rules in Article 11 and Article 12 are meant to apply to offshore boundaries, and not necessarily to those in internal waters.

> "International boundaries to distinguish offshore sovereignty and rights are limited to those extending through the territorial sea and over the continental shelf. In internal waters any international boundaries

are integral parts of those of the adjoining land area, hence not definable as offshore." Pearcy, *supra* note 15, at p. 16.

The error made by the special master was to apply to the boundary in the Piscataqua River the rules that the outer limit of the territorial sea may be measured from low tide elevations within the territorial sea (Territorial Sea Convention, Art. 11(1)), and that therefore the median line *in the territorial sea* may be measured from these elevations (Art. 12(1)).[25] That low tide elevations may be used for drawing the median line in the territorial sea in no way implies that they can therefore be used for drawing the median line in internal waters. An analysis of Articles 11 and 12 reveals that the opposite is in fact the case. It will become clear in the ensuing discussion that the confusion, which has been recognized to exist by the International Law Commission itself and by other commentators,[26] arises from the "unfortunate" use of the phrase "as the baseline" in Article 11.[27]

[25] That this was the basis of the special master's conclusion is clear from his citation of Article 11 of the Territorial Sea Convention, which relates to the measurement of the territorial sea; *United States* v. *Louisiana*, 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969); 420 U.S. 529 (1975), in which the issue also was the measurement of the breadth of the territorial sea; and the boundary studies by the United States Department of State, of which one involved a territorial sea boundary, and two concerned continental shelf boundaries (Report, p. 42, fn. 84) See pp. 43-44, *infra*.

[26] Report of the International Law Commission Covering the Work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 16; International Law Commission, Sixth Session, Summary Record of the 260th Meeting, U.N. Doc A/CN. 4/SR.260, p. 16 (per Francois, Rapporteur of the Session); Fitzmaurice, *supra* p. 20, at 87.

[27] Fitzmaurice, loc. cit. *supra* note 26.

The history of Article 11(1) reveals that its purport is that when a low tide elevation is located within a state's territorial sea as measured from the actual coastline, the elevation has its own territorial sea, and will thus cause a bulge in the territorial sea of the state.

An early version of Article 11 provided,

> "Elevations of the sea-bed which are only above water at low tide and are situated partly or entirely within the territorial sea shall be treated as islands for the purpose of determining the outer limit of the territorial sea." Francois, "Second Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61, p. 30, Art. 5(1).

The comment of the Rapporteur with respect to this provision stated that,

> "a distinction is drawn between islands and drying rocks. . . . [A]n island has its own territorial sea; *a drying rock is deemed to be an island for this purpose only if it is situated partly or entirely within the territorial sea extending along the coast.* A drying rock situated outside the territorial sea is not regarded as having its own territorial sea." [Emphasis supplied] Francois, *supra*, p. 33-34.

This Article was amended during the same session of the International Law Commission to read as follows:

> "Article 5: (1) As a general rule and subject to the provisions regarding bays and islands, the breadth of the territorial sea is measured from the low-water line along the coast. . . . (3) Drying rocks and shoals that are exposed between the datum of the chart and high

water if within the territorial sea, *may be taken as individual points of departure for measuring the territorial sea, thus causing a bulge in the outer limit of the latter.*" [Emphasis supplied]. Francois, "Addendum to the Second Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session (1953), U. N. Doc. A/CN. 4/61/ Add. 1, Art. 5, pp. 5-6.

Immediately following this provision was Article 5a, which permitted the drawing of straight baselines in areas where the coast was deeply cut into or where there were islands in its immediate vicinity, but stated that "baselines should not be drawn to and from drying rocks and shoals." Francois, "Addendum. . . ," *supra,* at p. 6. The distinction is therefore developing here between considering that low tide elevations within a state's territorial sea have their own territorial sea, thereby causing a bulge in the state's territorial sea (which was permitted), and using low tide elevations for drawing straight baselines and thereby extending internal waters (which was not permitted).

The following Articles appeared in later versions of the Draft:

> "*Article 11.* Every island has its own territorial sea. An island is an area of land surrounded by water which is permanently above high water mark. . . ."
> "*Article 13.* Drying rocks and shoals that are exposed between the datum of the chart and high water and are situated wholly or partly within the territorial sea may be taken as individual points of departure for measuring the territorial sea."

> Francois. "Third Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session (1954), U. N. Doc. A/CN. 4/77, p. 12-13.

The comment to Article 13 stated, at page 13:

> "A distinction has been made between islands and drying rocks. An island off the coast, even if situated outside the territorial sea, always possesses a territorial sea of its own. A drying rock is only deemed an island in this respect when situated wholly or partly within the territorial sea along the coast. A drying rock lying outside the territorial sea possesses no territorial sea of its own."

The following year, the International Law Commission re-drafted the relevant portion of its previous Article 5, and designated it Article 12:

> "Drying rocks and shoals which are wholly or partly within the territorial sea may be taken as points of departure for delimiting the territorial sea." Report of the International Law Commission Covering the Work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 16.

The Commentary to this Article further explained it, and dealt with suggestions that it might be inconsistent with the rule in a previous article that straight baselines may not be drawn to and from drying rocks:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will accordingly make allowances for the presence of such drying rocks and will jut out to sea off the coast. Drying

rocks and shoals however which are situated outside the territorial sea have no territorial sea of their own.

"The Commission considers that the above Article expresses the international law in force.

"It was said that the terms of Article 5 (under which baselines are not drawn to or from drying rocks and shoals) might perhaps not be compatible within Article 12. The Commission does not consider them incompatible. The fact that for the purpose of determining the breadth of the territorial sea drying rocks and shoals are assimilated to islands does not imply that such rocks are treated as islands in every respect. If they were, then, so far as the drawing of baselines is concerned, and in particular in the case of shallow waters off the coast, the distance between the baselines and the coast might conceivably be far in excess of that intended to be laid down by the method of these baselines." Report . . . ., *supra,* at p. 16.

Rapporteur Francois, who authored the Article, made the following significant comment:

> "The gist of [the Article] was that a drying rock within T miles of the coast (where T = breadth of the territorial sea) could serve to extend the territorial waters by causing a bulge in the outer limit of the latter. . . ." International Law Commission, Sixth Session, Summary Record of 260th Meeting (1954) U. N. Doc. A/CN. 4/SR. 260, p. 14.

As to whether this Article conflicted with the provisions regarding baselines, he stated, at page 16:

> "Article 13 embodied a general principle, whereas Article 6 referred to a special case.

> "Article 13 laid down the general rule *for measuring the territorial sea from the normal baseline,* namely the low water line. For that purpose, rocks emerging at low water were to be taken into account provided, of course, that they were less than T miles from the shore. Article 6 was concerned with the exceptional case in which a state, because of its deeply indented coast, was allowed the special privilege of simplifying the perimeter of its territorial sea by drawing straight baselines as an artificial substitute for the normal baseline (low water line) because the latter would be too sinuous. Its provisions were therefore framed restrictively. It forbade the drawing of straight baselines to and from the banks and rocks emerging only at low tide."

The Commentary to Article 11 stated:

> "Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

The Final Report of the International Law Commission [Report of the International Law Commission Covering the Work of its Eighth Session (1956), Gen. Ass. Off. Rec., 11th Sess., Supp. No. 9 (A/3159)] contained the following provisions:

> "Baselines shall not be drawn to and from drying rocks and drying shoals." [Art. 5 (1); this eventually became Convention Art. 4(3)].

"Every island has its own territorial sea." [Art. 10; eventually Convention Art. 10 (2)].

"Drying rocks and drying shoals which are wholly or partly within the territorial sea, as measured from the mainland or an island, may be taken as points of departure for measuring the extension of the territorial sea." (Art. 11; eventually Convention Art. 11).

The Commentary to Article 11 stated, at p. 17:

"Drying rocks and shoals situated wholly or partly in the territorial sea are treated in the same way as islands. The limit of the territorial sea will make allowance for the presence of such drying rocks and will show bulges accordingly. On the other hand, drying rocks and shoals situated outside the territorial sea, as measured from the mainland or an island, have no territorial sea of their own."

These excerpts from the proceedings of the International Law Commission are set forth in detail in order to show conclusively the true meaning of Article 11, and its relationship to Articles 4 and 12. Article 11 expresses the principle that when a low tide elevation is situated within the territorial sea as measured from the actual coastline, it possesses its own territorial sea, and accordingly causes a bulge in the territorial sea of the coastal state. This principle is represented pictorially at 1 Shalowitz, *supra,* at p. 226, and 2 Shalowitz, *supra,* at pp. 379-380; and in Pearcy, *supra,* at p. 9. On the other hand it is quite clear that low tide elevations cannot cause an extension of internal waters. This is clear from Article 4, which prohibits the drawing of straight baselines to and from low tide elevations, and which permits internal waters

to be extended to other off-shore features only when such features are so integrally related to the coastline as to constitute a part thereof. As McDougal and Burke state,

"[T]he provision in Article 11 was not intended to authorize drawing of baselines from or to a drying rock or to create internal waters by the authorization contained in this Article." Public Order of the Oceans (1962), p. 394.

"What the Article authorized in this interpretation, was only extension of the outer limit of the territorial sea and this does not require laying down baselines. *Nor does it necessitate regarding areas landward of the drying rocks as internal waters.* This appears to have been the result sought by the [International Law] Commission." (Emphasis supplied.) Ibid., at p. 394, fn. 237.

"[Article 11] deliberately emphasizes that the purpose of using the drying rock was to affect the outer limit of the territorial sea and not to create new areas of internal waters." Ibid., p. 396.

Article 12, which sets forth the rules for drawing the median line in the territorial sea, must be interpreted in this context. This article, read together with Article 11(1), states that the median line *in the territorial sea* may be measured from those low tide elevations which are located within the territorial sea of the coastal state as measured from the actual coastline. *This is because low tide elevations so situated are deemed to possess their own territorial sea,* and cause an outward bulge in the coastal state's territorial sea. Therefore, in drawing a median line in territorial waters between opposite states, when there exist low tide elevations within the breadth

of the territorial sea as measured from one coast, the line must be drawn so as to take into account the territorial sea possessed by the elevation, and the consequent extension of the coastal state's territorial sea.[28] In short, the median line divides the territorial sea of the low tide elevation and that of the opposite coast.

The same does not apply in internal waters, such as the river. Low tide elevations do not possess their own internal waters; and it has been shown that they cannot extend internal waters. There is no zone of internal waters appertaining to low tide elevations, and no bulge in the coastal state's internal waters, which must be taken into account in drawing the median line. In fact, to measure the median line from such elevations in internal waters

[28] This principle was contained in earlier versions of Article 12: "An international boundary between countries the coasts of which are opposite each other at a distance of less than 2T miles (T being the width of the territorial sea) should as a general rule be the median line, every point of which is equidistant from the baselines of the States concerned. Unless otherwise agreed between the adjacent States, all islands should be taken into consideration in drawing the median line. Likewise, drying rocks and shoals within T miles of only one State should be taken into account, but similar elevations of undetermined sovereignty, that are within T miles of both States, should be disregarded in laying down the median line. . . ." Francois, "Addendum to the Second Report on the Regime of the Territorial Sea," International Law Commission, Fifth Session, U.N. Doc. A/CN.4/61/Add. 1, p. 8.

Elevations of undetermined sovereignty within the breadth of the territorial sea from both states are disregarded because, being so situated, they extend the territorial sea of *both* opposite states, and thus cancel out any effect on the median line.

This detailed wording was eventually amended to produce the more general version of Article 12 because the Commission felt "that the provision should not be too detailed but should retain a certain latitude." Report of the International Law Commission Covering the Work of its Sixth Session (1954), Gen. Ass. Off. Rec., 9th Sess., Supp. No. 9 (A/2693), p. 17.

implies that they do extend internal waters, which is contrary to the Territorial Sea Convention.

(f) *The Authorities Cited by the Special Master do Not Support his Conclusions.*

Many of the authorities cited by the special master (Report, p. 42, fn. 84) to support his conclusion that the median line in the river may be measured from low tide elevations have been discussed in previous sections and distinguished from the instant case. None of the sources cited justify such a conclusion.

The work by Boggs, International Boundaries: A Study of Boundary Functions and Problems (1940) nowhere states that the median line in internal waters may be measured from low tide elevations. Similarly, Shalowitz contains nothing to this effect. In fact, both of these authorities indicate quite the contrary. The case of *United States* v. *Louisiana*, 394 U.S. 11; 89 S. Ct. 773; 22 L. Ed. 2d 44 (1969) has been distinguished above (see *supra*, note 10).

Finally, the boundary studies by the United States Department of State deal with the territorial sea and continental shelf, and as explained above, the precise rules governing the delimitation of these areas do not apply to internal waters. Moreover, "the Abu Dhabi — Qatar [boundary] was not delimited according to the strict application of equidistance principles." U.S. Department of State, Office of the Geographer, International Boundary Study, Series A, No. 18, Continental Shelf Boundary: Abu Dhabi — Qatar, p. 3. Also, the Bharain — Saudi Arabia continental Shelf Boundary was fixed by agreement of the parties, rather than by strict application of the continental shelf equidistance principle, and this delimitation ignored

small islands between the coasts. U.S. Department of State, Office of the Geographer, International Boundary Study, Series A, No. 12, Continental Shelf Boundary: Bharain — Saudi Arabia, p. 3.

V. The Special Master Erred in Determining the Geographic Median Line in Gosport Harbor.

The special master concluded that the middle of Gosport Harbor is also the geographic median line. Report, p. 43. However, he mistakenly determined the point of intersection of this median line with the closing line of the harbor by bisecting the closing line, rather than by finding the point on that line which is equidistant from the nearest points on the opposite sides.[29] This latter method is the one used by the special master to find the intersection point on the closing line of Portsmouth Harbor, and is the method approved by the authorities cited *supra* in footnote 3. By this method, the intersection point is at point E, which is slightly northeasterly of the point reported by the special master. Point E is equidistant from points F and G, the latter two being the points on the opposite sides which are nearest to point E.

[29] The *amicus* suspects that this was an inadvertent oversight by the special master. In an early draft of the Report of the Special Master, the intersection point in the closing line of Portsmouth Harbor was determined by bisecting that line. This method was later abandoned in favor of the method used in the Report, which is the method approved by the authorities cited in footnote 3, *supra*. The *amicus* suspects that the special master inadvertently neglected to make the same change in the closing line of Gosport Harbor.

Conclusion.

The Lateral Marine Boundary Between New Hampshire and Maine.

The "lights on range" line, urged by the *amicus curiae*, is depicted on Appendix A.

The line labeled "Alternative 1" is the line connecting the intersection of the median line in the Piscataqua River and the Frost Point-Gerrish Island closing line with the relevant point on the closing line of Gosport Harbor determined as explained in the previous section. "Alternative 2" is the line connecting the intersection of the median line in the Piscataqua River with the harbor closing line reported by the special master and the analogous point in Gosport Harbor. The river median line in Alternatives 1 and 2 has been determined without reference to low tide elevations.

The line labeled "special master" is the line reported by the special master in this case.

Respectfully submitted,

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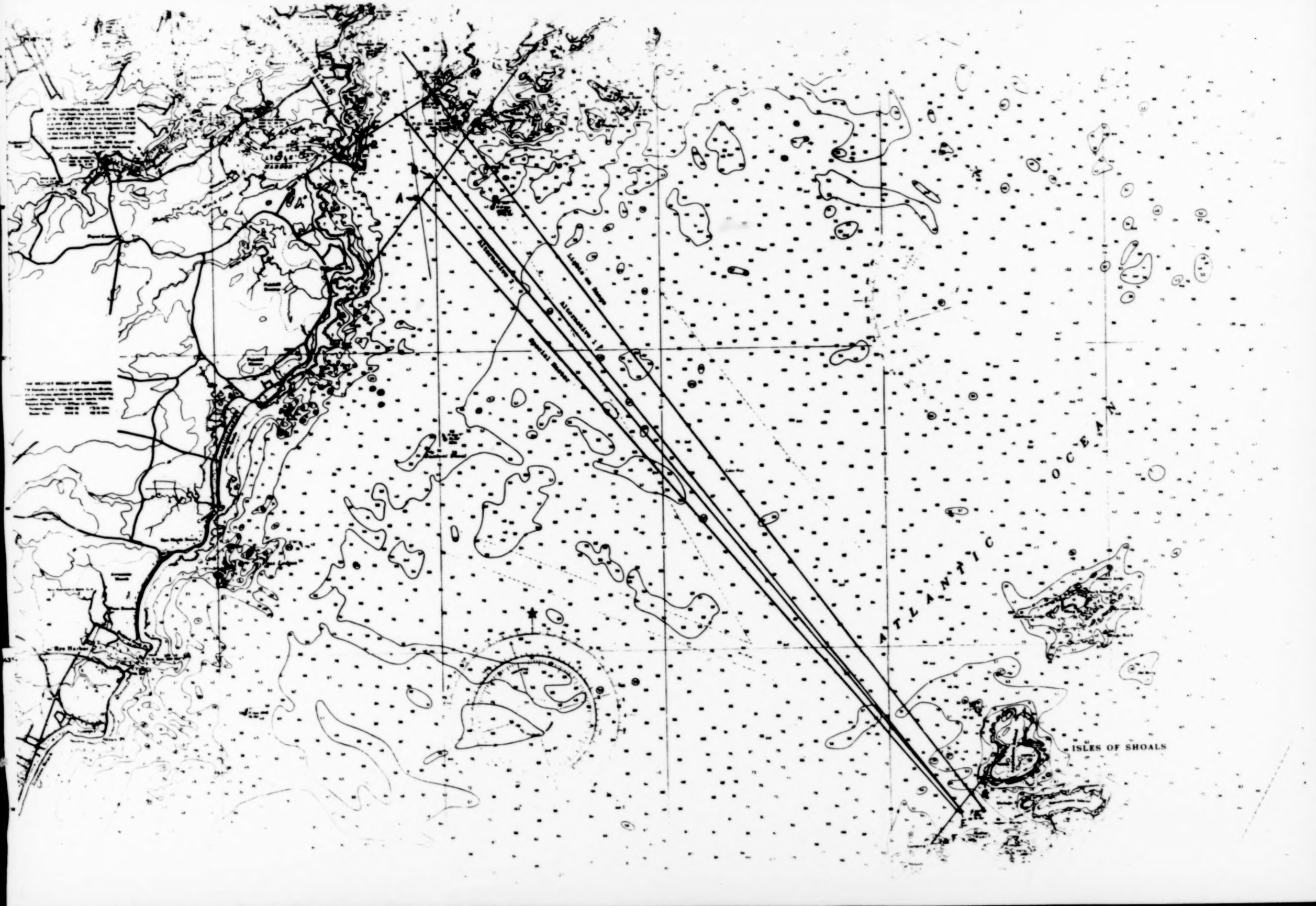
Appendix A.

United States Department of Commerce, National Oceanic and Atmospheric Administration, National Ocean Survey, C & GS Chart 211, "Portsmouth Harbor: Cape Neddick Harbor to Isles of Shoals."

The original of this chart is filed separately with the Clerk of the Supreme Court of the United States.


Alternative 3
Lights on Range
Alternative 1
Special Marker
ATLANTIC
OCEAN
ISLES OF SHOALS